Appeal From Appellate Decree No. 352 of 1989

Against the judgment and decree dated 24.6.1989 passed by Shri Shiveshwar Narain,6th Additional Sessions Judge,Patna in Title Appeal No. 121/85 dismissing the appeal preferred against the judgment and decree dated 29.6.1985 passed by the Second Munsif, Patna in Title Suit No. 112 of 1969.

MD.SALAHUDDIN KHAN----------Appellant
Versus
BIBI BANI FATMA & ORS----------Respondents

For the Appellant:- In person
For the Respondents:- None

P R E S E N T

THE HON'BLE MR. JUSTICE CHANDRAMAULI KUMAR PRASAD
THE HON'BLE MR. JUSTICE SHAILESH KUMAR SINHA

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Prasad & Sinha,JJ:- Plaintiffs-respondents filed suit for eviction of the defendant from the suit premises on ground of default in payment of the rent. On the basis of the pleadings of the party, the trial Court framed various issues including the following issues:-

Xx xx xx

Xx xx xx

"3.Whether the plaintiff is an imposter lady and not the land lady of the suit house?

4.Whether the defendant is liable to be evicted on the ground of default in payment of rent of the suit premises?

5.Whether the suit house is enemy property and it has vested in the custodian of enemy property?"

On consideration of the evidence on record the Munsif, Second,Patna i.e. the trial Court by judgment and decree dated 29th of June, 1985 passed in Title Suit No. 112 of 1969 held that the plaintiff "is not a real lady of the suit house and there does not exist relationship of the landlord and the tenant between the plaintiff and the defendants".

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Plaintiff aggrieved by the same preferred Title Appeal No. 121 of 10985/45 of 1987. Additional District Judge,VIth, Patna by judgment and decree dated 24th of June, 1989 dismissed the appeal. However it recorded a finding that relationship of landlady and tenant exists between the plaintiff and the defendant but declined to pass the decree for eviction on the ground that the disputed premises had been declared enemy property and

vested in the custodian appointed under the Enemy Property Act, 1968.

Defendant aggrieved by the aforesaid finding has preferred this second appeal.

By order dated 17.9.1991 this appeal has been directed to be heard on the following question of law:-

> i)"Whether a second appeal would be maintainable despite the fact that the trial Court has dismissed the suit of the respondent and the learned Court of appeal below has also dismissed the appeal although it held one issue in favour of the respondent,namely, that the plaintiff is the landlord of the defendant?
> ii)Whether the learned Court of appeal below had right to hold that the plaintiff is a landlord of the defendant although it dismissed the appeal holding that the property in question has vested in the custodian under the provision of Enemy Properties Act, 1968."

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Appellant, appears in person. Despite service of notice, nobody has chosen to appear on behalf of the respondents.

Mr. Khan, submits that in case it is held that the finding recorded by the lower appellate Court that relationship of landlady and the

tenant exists between the plaintiff and the defendant the appeal would be maintainable. However in case it is found that the said finding shall not operate as res judicata, this appeal would not be maintainable.

In support of the submission, reliance has been placed on a Full Bench decision of this Court in the case of Arjun Singh Vs. T.D. Fhosh(AIR 1974 Patna 1) and our attention has been drawn to the following passage from paragraph 3 of the judgment. Same reads as follows:-

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> "That being so, it is plain that the decision recorded by the lower appellate Court as to the merits of the alleged decision of the Cabinet, in the eye of law, is no decision as it was not necessary to be recorded. The merit of a decision which could not be looked into and which was in vacuum was not necessary to be gone into and all the findings recorded by the lower appellate Court in that regard must be deemed to be of no effect. In that view of the matter, it is manifest that the decision of the lower appellate Court on those issues, as contended on behalf of the plaintiff respondents in Second Appeal No.728 of 1969, cannot operate as res judicata in a subsequent suit or proceeding. It is well settled that a party against whom a finding is

> recorded has got a right of appeal even though the ultimate decision may be in his favour if the finding can operate as res judicata in a subsequent suit or proceeding;if, however, it cannot operate as res judicata then such a party has no right of appeal. Having held that the decision of the lower appellate Court on points 4,5 and 6 recorded against defendant no.4 and in favour of the plaintiffs cannot operate as res judicata in a subsequent suit or proceeding. We have got to hold that the appeal filed by defendant no.4 is not maintainable. Hence, accepting the preliminary objection raised on behalf of the plaintiff respondents, we dismiss Second Appeal No. 728 of 1969 as being not maintainable."
>
> (Underlining ours)

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He further submits that once the lower appellate Court had held that the property had vested in the custodian under the Enemy Property Act, plaintiff cannot be said to be the landlady of the suit premises.

We are of the opinion that the lower court having held that property had vested in the Custodian appointed under the Enemy Property Act, it was unnecessary to go into the question of relationship of landlord and tenant between the party and as such the

finding recorded by the lower appellate Court shall not operate as res judicata in a subsequent suit or proceeding. Once it is held so, the Second Appeal preferred by the defendant appellant is not maintainable. The view which we have taken finds support from the decision of this Court in the case of Arjun Singh (supra).

In view of aforesaid, we deem it inexpedient to answer the second question of law indicated above.

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It is relevant here to state that plaintiffs have preferred cross-objection aggrieved by the findings on issues no.4 and 5. However, when the matter is taken up nobody has chosen to appear on their behalf. Ordinarily we would had adjourned the hearing but in view of the fact that this appeal is pending since 1989, we are not inclined to charter the said course and dismiss the cross-objection for want of prosecution.

Appeal stands dismissed as not maintainable with the observation aforesaid.

(Chandramauli Kr.Prasad,J.)

(Shailesh Kumar Sinha,J.)

Patna High Court
Dated the 23rd of June,2008
A.Kumar/NAFR

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